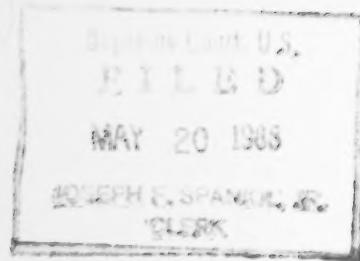


87-2113



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GREGORY JACKSON
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ALASKA

WEIDNER AND ASSOCIATES
Phillip Paul Weidner &
Associates, Inc.
A Professional Corporation

Philip Paul Weidner
By: PHILLIP PAUL WEIDNER
920 West 6th Avenue
Suite 100
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(907) 276-1200

Attorney for
Petitioner

June 24, 1988



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STATE OF ALASKA,
ALASKA SUPREME COURT
OF APPEALS FILE NO.-
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1988

CERTIFICATE OF SERVICE BY MAIL

EXHIBIT A.

FINAL ORDER OF THE SUPREME COURT
OF THE STATE OF ALASKA DENYING
PETITION FOR HEARING IN GREGORY
JACKSON V. STATE OF ALASKA,
[SUPREME COURT FILE NO. S-2626]
EFFECTIVE MARCH 21, 1988

IN THE SUPREME COURT OF THE STATE OF ALASKA

GREGORY JACKSON,	)	Supreme Court No.
	)	S-2626
Petitioner,	)	<u>O R D E R</u>
vs.	)	Filed and Entered
STATE OF ALASKA,	)	APPELLATE COURTS
Respondent.	)	of the STATE OF
	)	ALASKA
	)	May 21, 1988
	)	By /s/ Deputy

Court of Appeals No. A-2026

Trial Court No. 3ANS-83-07223 Cr.

Before: Matthews, Chief Justice,
Burke, Compton and Moore,
Justices. (Rabinowitz,
Justice, not
participating).

On consideration of the petition
for hearing, filed on February 26, and the
response to the petition, filed on March
3, 1988,

IT IS ORDERED:

The petition for hearing is

denied.

Entered by direction of the
court at Anchorage, Alaska on March 17,
1988.

/S/ DAVID A. LAMPEN

Clerk of the Supreme Court

EXHIBIT B.

FINAL OPINION OF THE COURT OF
APPEALS OF THE STATE OF ALASKA
DENYING MERIT APPEAL IN GREGORY
JACKSON V. STATE OF ALASKA
[OPINION NO. 781, FILE NO. A-
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NOTICE: This opinion is subject
to formal correction before
publication in the Pacific
Reporter. Readers are
requested to bring typographical
or other formal errors to the
attention of the Clerk of the
Appellate Courts, 303 "K"
Street, Anchorage, Alaska 99501,
in order that corrections may be
made prior to permanent
publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

GREGORY JACKSON,)	
Appellant,	)	File No. A-2626
	)	<u>O P I N I O N</u>
v.)	
)	
STATE OF ALASKA,	)	[No. 781 -
	)	February 11, 1988]
Appellee,)	
)	

Appeal from the Superior Court
of the State of Alaska, Third
Judicial District, Anchorage, J.
Justin Ripley, Judge.

Appearances: Thomas A. Flippen.

II, Boyko, Boyko, Dennis,
Baldwin & Breeze, Anchorage,
for Appellant. Robert D.
Bacon, Assistant Attorney
General, Office of Special
Prosecutions and Appeals,
Anchorage, and Grace Berg
Schaible, Attorney General
Juneau, for Appellee.

Before: Bryner, Chief Judge,
Coats and Singleton, Judges.

COATS, Judge.

Gregory Jackson was convicted,
following a jury trial, of murder in the
first degree. AS 11.41.100. Superior
Court Judge J. Ripley sentenced Jackson to
fifty years' imprisonment. Jackson is
eligible for parole after twenty years
pursuant to AS 12.55.125. Following his
conviction and sentencing, Jackson filed a
motion for a new trial based on his
contention that he received ineffective
assistance of counsel at his trial.
Following an evidentiary hearing in the
trial court, Judge Ripley denied Jackson's

new trial motion. Jackson appeals to this court from the denial of his new trial motion. He also argues that his sentence was excessive.

FACTS

During the early morning hours of November 10, 1983, Gregory Jackson and a female companion, his codefendant, Carmelita A. Danzy, aka Carmelita A. Jones, went to Newkirk's, an after-hours club in the Fairview area of Anchorage. Newkirk's has a reputation for drugs, prostitution and violence. Gregory Jackson customarily armed himself when going to such places.

Inside, Danzy was approached by Vernon Jackson, her former boyfriend. Vernon Jackson was not related to Gregory Jackson. Vernon Jackson wanted to talk to Danzy. Danzy followed Vernon Jackson into the bathroom for a private conversation. After a short time, Gregory Jackson went to the bathroom to check on Danzy. Gregory Jackson stood in the doorway and told Danzy to "talk outside." Danzy left

the bathroom, leaving the two Jacksons to face each other.

According to Albert Ford, who was present in the bathroom, just as Danzy left, Vernon Jackson moved towards Gregory Jackson. Vernon reached for Gregory's hand which was inside his jacket. Ford testified that Gregory Jackson then pulled a gun and fired two shots. Gregory Jackson fired twice more as Vernon Jackson tried to leave the bathroom.

Sherry Newkirk, the bartender, testified that she heard two shots. She then saw the bathroom door open and saw Vernon Jackson coming out. She then heard two more bullets. A pathologist testified that Vernon Jackson's body was hit by three bullets. One entered the upper chest and passed through the heart. Another bullet entered Vernon Jackson's right side and exited his chest. A third

entered his lower back and passed through his abdomen. A fourth shot hit the right sleeve of Vernon Jackson's coat but did not strike him.

Gregory Jackson, however, testified that Vernon Jackson had moved towards him in a menacing manner while reaching inside his own jacket. During the brief struggle, Gregory Jackson pinned Vernon Jackson's hand against his chest and knocked him off balance. This allowed Gregory Jackson time to pull his own gun. Thus, when Vernon Jackson once again came towards Gregory Jackson, Gregory Jackson said he fired four shots.

Vernon Jackson died from the gunshot wounds. Gregory Jackson argued at trial that he acted in self-defense. A .22 caliber automatic pistol, with four rounds in the clip, was found in Vernon Jackson's pocket shortly after the

homicide. The pistol did not have a round chambered. In order for the pistol to be fired, the slide would have to be pulled back and released to chamber a round.

DISCUSSION

The Alaska standard for determining whether a defendant is entitled to a new trial based on ineffective assistance of counsel is set forth in Risher v. State, 523 P.2d 421 (Alaska 1974). In Risher, the Supreme Court of Alaska established a two-prong test which a defendant must meet to obtain a new trial based on a claim of incompetence of counsel. First, the defendant must establish that defense counsel's overall performance did not conform to the requisite stand of

competence.¹ Second, the defendant must create a reasonable doubt that the lack of competency contributed to the conviction. Id. at 425. The federal test for whether a defendant is entitled to a new trial based on a claim of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland court articulated a two-prong standard similar to the standard which the Alaska Supreme Court established in Risher. In Strickland, the court stated:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

¹ "All that is required of counsel is that [counsel's] decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions taken by an attorney skilled in criminal law. . . ." 525 P.2d at 424.

serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In Strickland, the court placed the following burden on the defendant to show prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Although the federal and Alaska tests for obtaining relief based on ineffective assistance of counsel are

similar, the defendant has a lesser burden of showing prejudice under the Alaska test. Wilson v. State, 711 P2d. 547, 549 (Alaska App. 1985).

Jackson argues that he received ineffective assistance of counsel based on his attorney's failure to properly investigate and prepare for trial, his attorney's failure to call an allegedly critical witness, his attorney's failure to voir dire jurors with respect to their racial attitudes, and his attorney's failure to ask for lesser-included offense instructions.

Jackson was represented at trial by John C. Howard, an experienced criminal defense attorney from Illinois. Howard came to Anchorage to confer with Jackson at the time of arraignment, then returned to Chicago. A jury trial was held in Anchorage in March 1984, in front of Judge

Ripley. After Jackson was convicted, Howard testified at an evidentiary hearing on Jackson's motion for a new trial. Howard testified that he had been practicing law for twenty-five years and, during that time, had averaged more than one murder or manslaughter trial per month, totaling several hundred homicide trials. From the record, it appears that Howard is highly regarded as a criminal defense attorney in Illinois, particularly in homicide cases.

At the February evidentiary hearing, Howard testified that after his initial discussion with Jackson, and based upon his prior dealings with Jackson, he was satisfied he could prevail at trial by arguing that Jackson had acted in self-defense. Although the district attorney's office apparently sent copies of the police reports to Howard, Howard stated

that he had not seen any discovery materials prior to arriving in Alaska, just before trial. He added that he did no investigation and seriously underestimated the strength of the state's case. Howard stated that his failure to investigate the case and to request additional time to seek other witnesses was a disservice to Jackson.

This court has formally cited with approval the American Bar Association's Standards relating to the defense function in the context of an ineffective assistance of counsel case. Arnold v. State, 685 P.2d 1261, 1265, (Alaska App. 1984). Those standards state:

It is the duty of the lawyer to conduct a prompt investigation of the circumstance of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of

conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

I Standards for Criminal Justice, Sec. 4-

4.1 (Approved Draft 1982).

Howard's investigation in this case was clearly inadequate for a first-degree murder charge. Consequently, we have reviewed the record with particular care to determine whether Jackson was prejudiced.

At the evidentiary hearing on his new trial motion, Jackson presented several witnesses whom he claimed should have been called at his trial. Judge Ripley conducted the actual trial and observed the witnesses testify at the post-conviction relief hearing. Thus, his

findings are certainly entitled to considerable deference. The questions of whether a defense counsel's performance was adequate and whether prejudice has been established, however, are mixed questions of law and fact. Strickland, 466 U.S. at 698. Therefore, given the inadequate investigation in this case, we have independently scrutinized the testimony of the witnesses presented at the evidentiary hearing.

At the evidentiary hearing, Hurist Joubert testified that Albert Ford, the state's major eyewitness to the events surrounding the shooting, had made a statement the day after the homicide indicating that he believed that Gregory Jackson had killed Vernon Jackson in self-defense. Joubert also testified that Ford had said that the police had forced him to testify against his will. Joubert had

formerly been convicted of crimes of dishonesty. Joubert had been in jail with Gregory Jackson, and the state argued that he had the chance to fabricate testimony favorable to Jackson.

The record establishes that the decision not to call Joubert was a tactical choice on the part of Howard. Howard testified that he was aware of Joubert's potential testimony at the time of trial, but he concluded that it would have been a waste of time to call him as a witness. Tactical choices of counsel are given great deference. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

Jackson argues that Howard's tactical decisions in this case are tainted by his

lack of investigation. Judge Ripley found, however, that there had been a very thorough police investigation of the case which was set out in the police reports provided by Howard. Furthermore, Judge Ripley found that in spite of Howard's late preparation, Howard had the opportunity to conduct further investigation during the recess of the trial between Friday, March 16, 1984, when the state rested around noon, and Monday, March 19, 1984, when the defense began its case. Neither of these findings is challenged on appeal. Given these facts, it appears that Howard's tactical decision not to call Joubert was based on an adequate knowledge of the case. Joubert was certainly not an eyewitness to the shooting, and his credibility concerning whether Ford actually made the statement attributed to him is questionable. Under

these circumstances, we conclude that the tactical decision not to call Joubert did not constitute ineffective assistance of counsel.

At the evidentiary hearing, Jackson presented Louis Howard as a witness. Louis Howard testified that Mary Stills stated that Vernon Jackson left Newkirk's shortly before the homicide to retrieve his firearm from a car. Stills, however, testified that she could not remember that incident. Jackson argues that this testimony would tend to establish that Vernon Jackson armed himself specifically for the encounter with Gregory Jackson. In evaluating this testimony, Judge Ripley pointed out that Vernon Jackson was found in possession of a loaded firearm following the homicide. He concluded that it was not particularly material whether he had gone out to the car to obtain a

firearm after seeing Gregory Jackson inside Newkirk's.

The testimony concerning whether Jackson got the firearm from the car was not particularly persuasive and did not directly establish that Vernon Jackson went to get the gun after seeing Gregory Jackson. Louis Howard was impeached with a 1984 conviction for multiple counts of forgery. It was also established that Louis Howard had been incarcerated with Gregory Jackson between the time of Jackson's first trial and the time Louis Howard came forward as a witness. We agree with Judge Ripley that it does not appear that this testimony would have been particularly material.

Tyrone Brown and Calvin Chatman also testified at the hearing. Chatman testified that he was present at the scene of the crime. The state, however, showed

that Chatman was in jail on the date the crime was committed. Brown, Chatman, and Louis Howard testified that Vernon Jackson had a reputation as a cocaine dealer. Brown, Chatman, Joubert, and Larry Cleveland testified that Vernon Jackson had a reputation for violence. Judge Ripley concluded that Vernon Jackson's reputation as a cocaine dealer would not be admissible at trial. This appears to be a sound ruling. Whether or not Vernon Jackson was a cocaine dealer does not appear to be relevant to any issue at trial. Gregory Jackson testified at trial that he did not know Vernon Jackson and was not aware of his reputation for violence. Thus, evidence of Vernon Jackson's reputation for violence would not have been admissible to show Gregory Jackson's state of mind.

The testimony could have been

admissible, however, as circumstantial evidence that Vernon Jackson was the initial aggressor. In evaluating this testimony, Judge Ripley concluded that Vernon Jackson's character had already been adequately established at trial by the testimony of witnesses, by his presence in Newkirk's, and by the fact that he was carrying a concealed firearm. Judge Ripley concluded that the reputation for violence testimony would have been cumulative and not particularly productive. He concluded that Howard had chosen to base his case primarily on the testimony of his client, and the cross-examination of the state's witnesses. all of the witnesses who testified as to Vernon Jackson's reputation for violence had been confined with Gregory Jackson prior to coming forward with their testimony. Furthermore, Cleveland and

Chatman had felony convictions for crimes of dishonesty.

It appears that Vernon Jackson's reputation for violence was established to a large degree by the facts of the case. It also appears that Howard was aware that he could have obtained further information as to Vernon Jackson's reputation for violence, but made a tactical choice not to do so. We agree with Judge Ripley that the failure to find or call these witnesses would not have influenced the jury's decision in this case, and thus did not constitute ineffective assistance of counsel.

Jackson contends that Howard's failure to request any lesser-included offense instructions was ineffective assistance. This case went to the jury on instructions for murder in the first degree and murder in the second degree

only. At the evidentiary hearing, Howard testified that this was a tactical choice. He believed that this client had an excellent chance of being totally acquitted. He was afraid that if he requested lesser-included offenses, the jury might convict his client of one of the lesser-included offenses rather than totally acquitting him. Judge Ripley found that this was a reasonable tactical choice. As we have stated before, tactical choices of counsel are entitled to deference. We agree with Judge Ripley that this was a reasonable tactical choice.

Jackson further contends that Howard was ineffective because he chose not to voir dire the jury on racial issues. Vernon Jackson, the victim, was black. Moreover, Gregory Jackson, Howard, and the major witnesses in the case are black. At

the beginning of jury voir dire, the prosecutor asked the jurors a question concerning any racial attitudes. At the evidentiary hearing, Howard testified that, based upon his experience, he decided that it was not necessary to voir dire the issue of race. He stated that people normally do not admit any racial prejudice. He believed that it was best not to question on this issue. Judge Ripley found that this was a reasonable, tactical choice. We agree.

In summary, we find this to be a close case. We are particularly troubled by Howard's lack of investigation. We have therefore given this record particularly close scrutiny to determine whether Jackson was competently represented and received a fair trial. Except for his lack of investigation, it appears that Howard was an experienced and

capable attorney. Although Howard may have initially underestimated the state's case, he had a significant period of time over the weekend, in the middle of the case, after the state rested. Howard indicated that he was aware of Joubert's potential testimony, and he was aware of the possibility of establishing Vernon Jackson's reputation for violence. It appears that he made reasonable, tactical choices not to pursue these possibilities, choosing instead to try the case based on the witnesses who were present at Newkirk's.

Gregory Jackson certainly had a triable case of self-defense based mainly upon Vernon Jackson's possession of a loaded firearm. It appears, however, that he was convicted based upon the eyewitness testimony of Albert Ford and Sherry Newkirk, the fact that Vernon Jackson's

weapon did not have a round in the chamber, and the location of the bullet entry wounds in Vernon Jackson's body. It does not appear that further investigation by counsel would have undermined this evidence.

The best indication of whether an attorney's failure to investigate a case resulted in prejudice to a defendant lies in the nature of the evidence that is presented in the post-conviction relief hearing. We have independently reviewed the evidence that Gregory Jackson claims should have been presented at this trial. We find, in agreement with Judge Ripley, that this evidence does not appear to be sufficiently material to grant a new trial based on incompetence of counsel.

Finally, Jackson argues that his sentence was excessive. Jackson was thirty-seven years old at the time of

sentencing. He had three prior felony convictions: a Mann Act violation, possession of a controlled substance, and possession and distribution of heroin. He also had a misdemeanor conviction for unauthorized use of a weapon and unlawful possession of ammunition. All of these convictions took place from 1971 to 1973. Jackson completed parole on his latest felony conviction in 1981, two years before committing the present offense.

The maximum sentence for murder in the first degree is ninety-nine years. In Riley v. State, 720 P.2d 951, 952 (Alaska App. 1986), we pointed out that Alaska courts have consistently approved the imposition of maximum sentences for murder in the first degree. Given Jackson's age, his prior record, and the seriousness of the present offense, we conclude that the fifty-year sentence which Judge Ripley

imposed in this case was not clearly
mistaken.

The judgment of the superior court
is AFFIRMED.

EXHIBIT C.

MEMORANDUM OPINION AND JUDGMENT
OF THE COURT OF APPEALS OF THE
STATE OF ALASKA IN GREGORY
JACKSON V. STATE OF ALASKA
REMANDING TO SUPERIOR COURT FOR
FURTHER PROCEEDINGS [MOJ NO.
959, FILE NO. A-805, OCTOBER 23,
1985, UNREPORTED]

THE COURT OF APPEALS OF THE STATE OF ALASKA

GREGORY JACKSON,)
)
 Appellant,) File No. A-805
)
 v.) MEMORANDUM OPINION
)
 STATE OF ALASKA,) AND JUDGMENT*
 Appellee.) [No. 959 -
) October 23, 1985]

Appeal from the Superior Court of the
State of Alaska, Third Judicial
District, Anchorage, J. Justin
Ripley, Judge.

Appearances: Thomas A. Flippin,
II, Boyko, Davis & Dennis,
Anchorage, for Appellant.
Robert D. Bacon, Assistance
Attorney General, Office of
Special Prosecutions and
Appeals, Anchorage, and Norman

*Entered pursuant to Appellate Rule
214 and Guidelines for Publication of
Court of Appeals Decisions (Court of
Appeals Order No. 3).

C. Gorsuch, Attorney General,
Juneau, for Appellee.

Before: Bryner, Chief Judge,
Coats, Judge, and Katz, Superior
Court Judge.* [Singleton,
Judge, not participating.]

COATS, Judge.

Gregory Jackson was found guilty following a jury trial of murder in the first degree. Superior Court Judge J. Justin Ripley sentenced him to fifty years. On August 21, 1984, he moved for a new trial pursuant to Criminal Rule 35(c)(1), arguing that his conviction was the result of ineffective assistance of counsel. His motion was supported by a memorandum of law, and the affidavits of his new attorney and an investigator retained on his behalf. Also accompanying the motion were the statements of five

*Katz, Superior Court Judge, sitting by assignment made pursuant to Article IV, Section 16 of the Constitution of Alaska.

individuals who Jackson alleged were important potential witnesses his trial counsel failed to interview. The statements were signed at the bottom by the potential witnesses, followed by the notarized signature of the investigator who swore each statement was read and signed in his presence. Jackson's complaints encompass not only trial counsel's performance at trial, but also his pretrial and post-trial performance.

Superior Court Judge J. Justin Ripley ruled on the motion by order stating only:

Upon consideration of defendant's Motion for New Trial
IT IS ORDERED
that defendant's Motion for New Trial is DENIED.

Jackson moved for reconsideration. The state opposed reconsideration arguing, among other things, that Jackson had not complied strictly with the procedure set

forth in Barry v. State, 675 P.2d 1292, 1296 (Alaska App. 1984), since the sworn statements of the five potential witnesses were not really affidavits. Reconsideration was not granted. Because Judge Ripley summarily disposed of the motion, we do not know whether he denied the motion for technical or substantive reasons.

The state concedes that Hampton v. Huston, 653 P.2d 1058 (Alaska App. 1982), requires that the superior court's dismissal of Jackson's application for post-conviction relief must be reversed, and the case remanded. See also Wood v. Endell, ___ P.2d ___ Op. No. 486 (Alaska App. June 18, 1985). Our independent review of the proceedings shows that this concession is well-founded. See Marks vs. State, 496 P.2d 66, 67-68 (Alaska 1972).

It appears to us that on remand the

court will be required to conduct a hearing under Barry v. State, 675 P.2d 1292 (Alaska App. 1984). In Wood we stated:

It is settled that a claim of ineffective assistance of counsel is one that generally requires an evidentiary hearing to determine whether the standard adopted in Risher v. State, 523 P.2d 421 (Alaska 1974), was met by counsel's performance. Barry v. State, 675 P.2d 1292 (Alaska App. 1984). Particularly where, as here, it is the pretrial and post-trial performance of counsel as well as the performance during trial that is specifically alleged to have been inadequate, it is not sufficient that the trial judge found counsel's performance as observed in the course of trial to be adequate.

Op No. 486 at p.2-3. This case is remanded for further proceedings consistent with Hampton v. Juston, 653 P.2d 1058 (Alaska App. 1982) and Wood v. Endell, __ p.2d __, Opinion No. 486

(Alaska App. June 18, 1985) and Barry v.
State, 675 P.2d 1292 (Alaska App. 1984).¹

REMANDED.

'In this appeal Jackson has argued that his sentence is excessive. The parties to this appeal appear to agree that it is not imperative for us to decide the sentence appeal at this time. We assume that if Judge Ripley denies Jackson's motion for post-conviction relief, that Jackson will again appeal and we can consider his sentence appeal at that time. If Judge Ripley grants Jackson's motion for post-conviction relief it will have been unnecessary for us to decide Jackson's sentence appeal since even if he is reconvicted he will be resentenced. We therefore conclude that we will not decide Jackson's sentence appeal at this time.

EXHIBIT D.

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW OF SUPERIOR COURT IN STATE OF ALASKA V. GREGORY JACKSON, CASE NO. 3AN-S83-7223 CR. DATED APRIL 7, 1987 DENYING DEFENDANT'S MOTION FOR NEW TRIAL DATED AUGUST 24, 1984 [EXHIBIT J] MOTION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND MOTION TO CALENDAR EVIDENTIARY HEARING RELATING THERETO DATED JUNE 4, 1986 [EXHIBIT I HEREWITH] [APPEALED TO THE COURT OF APPEALS OF THE STATE OF ALASKA, FILED NO. A-2026]

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA THIRD JUDICIAL DISTRICT

STATE OF ALASKA)
)
 Plaintiff,)
)
vs.)
)
GREGORY JACKSON)
)
 Defendant.)
)

Case No. 3AN-S83-7223 CR

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The state proposes that the

court adopt the following findings of fact and conclusions of law regarding Gregory Jackson's claim that his lawyer, George C. Howard, rendered him ineffective assistance and that that prejudiced his defense.

General Conclusions and Findings

Found Not Found

/S/

1. Under Risher v. State, 523 P.2d 421 (Alaska 1974), and Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052 (1984) a defendant alleging ineffective assistance of counsel must establish, first, that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence displayed by one of

ordinary training and skill in
the criminal law; and, second,
that the lack of competency
contributed to the conviction.
See 523 P.2d at 425, 1045 S. Ct.
at 2064-69.

Found Not Found

/S/

2. The court concludes that
the defendant has not shown
either prong of Risher; or
Strickland: 1) the conduct of
trial counsel, George C. Howard
of Chicago, Illinois, was not
below the standard of a lawyer
reasonably skilled in the
practice of criminal law and 2)
even if there was substandard
conduct, the court finds, beyond
a reasonable doubt, that it did
not contribute to the

conviction.

Mr. Howard's Representation
of the Defendant

Found Not Found

/S/

3. Gregory Jackson was charged with murder in the first degree for shooting Vernon Jackson to death at an after-hours club,
/s/ Newkirk's, on November 10, 1983.

Found Not Found

/S/

4. The defendant Jackson was defended by George C. Howard, an attorney admitted to practice in Illinois, /s/ and Alaska per ARCP 81 and has defended several criminal cases in Alaska /s/.

Found Not Found

/S/

5. George Howard is an attorney of approximately 25 years of experience. He has tried, by his estimation, one homicide case (first degree murder, second degree murder or manslaughter) each month for the past twenty-five years. He /s/ testified without contradiction that he is regarded by judges and his fellow lawyers in Chicago as one of the best criminal defense lawyers in homicide cases in Chicago.

Found Not Found

/S/

6. George Howard has represented Gregory Jackson before and, based on that experience, /s/ from which he concluded G. Jackson related

credible information upon which
to base defense theories /s/,
chose in this case to rely on
Gregory Jackson's testimony
about of the facts surrounding
charges brought against him to
prove self-defense.

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/S/

7. George Howard met with and
talked to the defendant Gregory
Jackson for no more than a few
hours in November, 1983 and then
did not meet him again until
trial on March 13, 1984.

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/S/

8. The District Attorney's
Office had mailed Mr. Howard
copies of the police reports in
compliance with the discovery

rules in December, 1983.

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/S/

9. Notes on the face of Mr. Howard's file in the handwriting of an experienced legal secretary from Mr. Howard's office having 20 years of experience indicate that the police reports were received by his office in January, 1984.

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/S/

10. Mr. Howard testified that he in fact did not receive the police reports in December, 1983 or January, 1984, but only received them and read them the night before trial commenced, when he arrived in Anchorage and was given a copy by the District

Attorney's Office. He testified that he read the complete reports the night before the trial commenced.

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/S/

11. The court believes Mr. Howard's testimony about receiving and reading the reports the night before trial.

Found Not Found

/S/

12. Mr. Howard rendered his opinion that his performance at trial was above the standard of competence displayed by one of ordinary training and skill in the criminal law, and the court finds that his performance was above that shown by the average lawyer reasonably skilled in the

practice of criminal law based both on Mr. Howard's opinion and on the court's observation of his performance during trial.

Found Not Found

S/

13. The court finds that, despite Mr. Howard's late preparation, he had an opportunity to conduct investigation during the recess of the trial between Friday, March 16, 1984, at approximately noon when the state rested and Monday, March 19, 1984, when the defense began its case.

Found Not Found

/s/

14. The court finds that Mr. Howard adopted a strategy focusing on the eye-witnesses

who were inside the bathroom at Newkirk's where the shooting occurred; those witnesses were Albert Ford, Alonzo Lang, Carmelita Danzy and Gregory Jackson, all of whom testified at trial.

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/S/

15. The court finds that Mr. Howard had adequate time to conduct additional investigation (such as finding witnesses as to the victim's reputation for violence) had he chosen to adopt such a strategy, but he chose to follow a strategy of focusing on the witnesses who were inside the bathroom.

Found Not Found

/S/

16. At the time the jury retired to deliberate, Mr. Howard felt he had performed far above the standard of a lawyer reasonably skilled in the practice of criminal law and was confident of an acquittal.

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/S/

17. Following the verdict, a post-conviction petition was filed; copies of the affidavits which accompanied the petition (or statements substantially similar to those affidavits) were mailed to Mr. Howard for his review.

Evidence at the Post-Conviction Hearing

Found Not Found

/S/

18. The court held a hearing on

the post-conviction petition on February 25, 1987, and heard the testimony of witnesses and received stipulations as to evidence.

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/S/

19. The court heard the testimony of George C. Howard. It also heard from five witnesses who have been in jail with Gregory Jackson since his conviction: Calvin Chatman, Hurist Joubert, Larry Cleveland, Tyrone Brown, and Louis Howard. The court also heard the testimony of Mary Stills, telephonically.

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/S/

20. Mr. George Howard testified

that he had not conducted any investigation (independent of police investigation or his interview with the defendants Jackson and Danzy).

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/S/

21. The court finds that there was a very thorough police investigation of case; the police reports were placed in evidence as an exhibit in the proceedings; the police reports show that the following persons were inside Newkirk's at the time of the shooting: Alonzo Lang, Albert Ford, Eddie Lee Patterson, Mary Stills, Beverly Jean Jones, Eddie Walker, Sheralyn Newkirk, Marketta Joles, Roy L. Jackson, the

victim Vernon Jackson, and the defendants Carmelita Danzy and Gregory Jackson.

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/S/

22. Of these inside Newkirk's, the only witnesses inside the bathroom where the shooting occurred were the victim Vernon Jackson, Albert Ford, Alonzo Lang, Carmelita Danzy and Gregory Jackson. All testified at trial except the victim, who had been killed.

Found Not Found

/S/

23. At the hearing the defendant Jackson called two witnesses who claimed to have been inside Newkirk's after-hours joint at the time of the

shooting: Mary Stills and Calvin Chatman. The police reports did not indicate that Calvin Chatman had been at Newkirk's that night.

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/S/

24. The court finds the testimony of Calvin Chatman to be incredible /s/. Chatman claims to have been inside Newkirk's on November 10, 1983, to see the shooting, but was in fact in jail at the Cook Inlet Pretrial Facility. Based on court records and jail records in evidence before the court, Calvin Chatman was jailed on October 24, 1983, and remained there until November 17, 1983 (except for court appearances).

He could not possibly have seen
the events he claims to have
seen.

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/S/

25. The court has independently reviewed the court file in Calvin Chatman's case and seen his claim that he had been released on bail on November 10, 1983, is contradicted by the court record.

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/S/

26. The defense claims that Mary Stills could have testified that the victim Vernon Jackson went to retrieve his firearm from outside in a car after entering Newkirk's. She did not remember that, but Louis Howard

claims she told him that */s/
This is contradicted by Ms.
Stills testimony that Vernon
Jackson arrived at Newkirk's in
her company in her car and that
he did not have a gun /s/.
Even if the court accepts that
that is the case, it finds that
that would not have affected the
verdict; a firearm was found on
the victim Vernon Jackson when
police arrived following the
shooting and that fact was made
known to the jury and argued by
counsel at trial; the particular
manner in which the firearm got
into the defendant's possession
is inconsequential.

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/S/

The defendant also claims that

evidence shows the victim Vernon Jackson went to get his firearm after seeing Carmelita Danzy and Gregory Jackson inside Newkirk's and that this demonstrates an intent on his part to arm himself to prepare to meet them.

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/S/

There is no credible testimony to the effect that he went to get the gun after seeing Carmelita Danzy and Gregory Jackson as opposed to "before" seeing them.

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/S/

Louis Howard has convictions for crimes involving dishonesty and was in jail and spoke with the

defendant Jackson before his testimony.

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/S/

27. The court finds that the testimony of Tyrone Brown and Larry Cleveland as to their opinion of Vernon Jackson's reputation as a cocaine dealer would not have been admissible at trial.

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/S/

28. The court finds that Mr. Brown and Mr. Cleveland's opinion that the victim had a reputation for violence would have been admissible but would not have affected the verdict. The evidence would not have been admissible to show the

reasonableness of the defendant Jackson's conduct, because the defendant did not know the victim. At most, the evidence was admissible to show who was the initial aggressor. The court reaches the conclusion that their opinions would have no effect because (1) both Tyrone Brown and Larry Cleveland were in jail four to six months before the shooting and rendered their opinions based on experience years beforehand so that their knowledge of his reputation was at a substantially earlier time than the shooting and (2) both were confined in the same institution that Gregory Jackson was confined in and both had

opportunities to confer with him
and to fabricate a story before
they came forward to testify.

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/S/

29. The court does not believe
the testimony of Brown or
Cleveland.

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/S/

30. The testimony of Hurist
Joubert to the effect that the
state's witness Albert Ford,
made statement that he was
forced to testify by prosecutors
and police, the court finds,
would not have affected the
verdict.

Found Not Found

/S/

The court credits George

Howard's testimony that he was aware of that information at the time of trial. The court concludes that any failure to utilize it or to call Hurist Joubert to establish it independently would not have affected the verdict (1) because Albert Ford was already impeachable by inconsistencies in his prior statements to the police and Mr. Howard ably cross-examined him and (2) because the circumstances under which Albert Ford came to the police contradict any claim that he was forced to testify: from the statement of Officer Paul Schwartz of the Anchorage Police Department which was admitted by stipulation, Albert Ford called

through a Crime Stopper's telephone line to report that he was a witness; he went to the police; the police did not go to him to force him to give a statement; he chose Officer Schwartz because Officer Schwartz was the husband of his boss at the restaurant where he worked as a dishwasher or a cook.

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/S/

In addition, Joubert had a record of convictions for crimes of dishonesty for which he was in jail with the defendant and they had opportunity and motive to fabricate. This evidence would have been admissible at trial to

impeach his testimony.

Summary of Conclusions and Findings

Found Not Found

/S/

31. Mr. Howard testified that his reasonable failure to investigate /s/ several theories expressed by Defendant's present counsel /s/ affected the verdict.

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/S/

32. The court does not credit Mr. Howard's opinion on the effect of his failure to investigate. The court does not credit Mr. Howard's opinion (1) because Mr. Howard admitted that he had done no independent investigation to test the truthfulness of the affidavits

he had been shown. (It would be unreasonable for Mr. Howard to believe that the /S/ incredible testimony of Calvin Chatman would have helped his client) and (2) because Mr. Howard uncritically accepted the proposition that the victim Vernon Jackson's reputation for being a cocaine dealer would automatically come into evidence (under circumstances that the court concludes it would not). /s/

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/S/

33. The court also finds that Mr. Howard was biased because he was personally embarrassed and distressed by his mistaken confidence that the defendant

Jackson would be acquitted and he is /S/ trying to redeem that judgment by uncritically analyzing the affidavits and concluding that they would have had an effect on the outcome.

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/S/

34. The court concludes that the defendant, through his present counsel, has now had an opportunity to investigate the case thoroughly, even more thoroughly now with the benefit of hindsight.

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/S/

35. The court concludes that Mr. Howard's experience in defending murder cases exceeds that of the vast majority of

criminal defense attorneys /s/
and his performance at trial was
above the performance of which
most Alaska defense counsel are
capable. He chose not to take
advantage of a weekend to
investigate because he was
confident of his own skill and
his client's persuasiveness.
The evidence produced at the
3/25/87 /s/ hearing was neither
of a substance nor from
credible sources such that a
reasonable trial lawyer would
have spent his time searching
for evidence of that quality
rather than preparing cross-
examination of state eye-
witnesses or direct exam of his
own eye-witnesses.

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/S/

36. Therefore, the court concludes that the defendant has not shown substandard performance by George Howard.

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/S/

39. Furthermore, the court concludes beyond a reasonable doubt, that the evidence produced at the hearing would not have affected the verdict.

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/S/

37. The testimony of Calvin Chatman was incredible /s/ and, if presented at trial, would have helped the prosecution; any "failure" to investigate to find it was harmless beyond a reasonable doubt.

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/S/

38. The testimony by Brown and Cleveland about the victim's reputation for violence 1) was not credible and was based on experience with the victim years earlier and 2) would not have affected the verdict, because the victim's character had already been painted as unsavory by his presence in an after-hours bar and by his concealment of a firearm, among other trial testimony /s/.

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/S/

39. The testimony of Joubert and Louis Howard to prior statements by Albert Ford and Mary Stills went to impeachment

of them on minor points and,
beyond a reasonable doubt, would
not have affected the verdict.

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/S/

40. The court has also
considered the cumulative
effect of all of the evidence
offered by Gregory Jackson at
the hearing and concludes that
the cumulative effect would not
have affected the verdict /s/,
but would almost certainly
damaged defendant's case. /s/

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/S/

41. The court makes the
following finds with respect to
certain additional claims:

(a) As to the claim that Mr. Howard
did not discuss with the defendant a

decision not to seek an instruction on manslaughter or any other lesser included offense or instructions with respect to the defenses of provocation or the heat of passion, the court finds that (1) Mr. Howard's testimony that he did in fact discuss those things with the defendant Jackson is credible (and Jackson's affidavit does not suffice to establish any question). /s/

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/S/

/s/ The court has had the opportunity to observe the (illegible) and otherwise assess the credibility of defendant Gregory Jackson, he is not credible /s/.

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/S/

(b) Mr. Howard's decisions about the instructions fall within the range of decisions a reasonable trial lawyer would have made (1) because he felt that self-defense would prevail and that the jury might compromise on a lesser-included offense rather than acquit if offered the choice and (2) because the defense of provocation or the heat of passion was inconsistent with the claim of self-defense.

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/S/

(c) Mr. Howard's decision not to voir dire on the question of race within the range of choices that a reasonable trial attorney might make.

Found Not Found

/S/

42. In deciding that the evidence offered at the post conviction hearing would not have affected the verdict, the court is relying upon its assessment of the credibility of the witnesses at trial; the events occurred in an after-hours club /s/ and the victim was found with a concealed weapon in his clothing following the shooting, so the victim's character was already well apparent to the jury even without additional character testimony; by the same token, the character of Albert Ford was equally apparent. Ford was thoroughly impeached at trial so

the marginal impeachment on his being "forced" to testify (which was wholly negated by his Crime Stopper's call) would not have affected a reasonable person's assessment of his credibility.

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/S/

43. For these reasons, the petition is denied.

So Ordered /S/

DATED at Anchorage, Alaska, this 7th day of April, 1987, at Anchorage, Alaska.

/S/J. JUSTIN RIPLEY
Superior Court Judge

EXHIBIT E.

WRITTEN ORDER OF AUGUST 24, 1984
OF THE SUPERIOR COURT OF THE
STATE OF ALASKA IN STATE OF
ALASKA V. GREGORY JACKSON, CASE
NO. 3AN-S83-7223 CR. DENYING
DEFENDANT'S MOTION FOR A NEW
TRIAL DATED AUGUST 24, 1984
[APPEALED TO THE COURT OF
APPEALS OF THE STATE OF ALASKA,
FILE NO. A-805]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

)

Case 3ANS-83-7223 Cr.

ORDER

Upon consideration of
defendant's Motion for New Trial

IT IS ORDERED

that defendant's Motion for New

Trial is DENIED.

DATED at Anchorage, Alaska this
6th day of November, 1984.

/S/ J. JUSTIN RIPLEY
Superior Court Judge

EXHIBIT F.

MEMORANDUMS AND ORDERS OF THE
SUPERIOR COURT OF THE STATE OF
ALASKA IN STATE OF ALASKA V.
GREGORY JACKSON, CASE NO. 3AN-
S83-7223 CR. DATED DECEMBER 23,
1985 AND FEBRUARY 21, 1986
DENYING WITHOUT PREJUDICE
DEFENDANT'S MOTIONS FOR POST-
CONVICTION RELIEF AND MOTIONS
FOR EVIDENTIARY HEARING AND FOR
PRESENCE OF DEFENDANT PURSUANT
TO REMAND OF THE COURT OF
APPEALS OF THE STATE OF ALASKA,
RULE NO. A-805 [APPEALED TO THE
ALASKA COURT OF APPEALS, FILE
NO. A-1471]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
VS.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

MEMORANDUM AND ORDER

The Court has received this case

upon remand with the directive to conduct "further proceedings consistent with Hampton v. Huston, 653 P.2d 1058 (AK App. 1982), Barry v. State, 675 P.2d 1292 (AK App. 1984) and Wood v. Endell, Opinion No. 486." (AK App. June 18, 1985). The Court of Appeals also observed that "it appears [emphasis added] ... the court will be required to conduct a [Barry] hearing..." While that statement does not absolutely require a hearing, this Court desires to conduct one if appropriate. However, it is unclear just what the specific nature of the hearing should be, for I believe that a Barry/Hampton/Wood hearing has, in fact, been conducted.

This court is aware that the trilogy forbids summary disposition of Rule 35 ineffective assistance claims based upon the trial judge's assessment of observed conduct of counsel, as in Wood,

or without notice to petitioner and an opportunity to be heard, as in Hampton. However, in this case, though the Order was terse, the proceedings were not summary.

The record reflects that upon defendant's motion a hearing was held at which affidavits and unsworn documents were received and considered without objection by the State and without contention that they failed to establish a prima facie case. No material factual conflicts were asserted by the State nor was there a request to cross-examine defendant's witnesses. Barry, supra p.1296, headnotes 2 and 3. The hearing, premised upon the affidavits, consisted of argument of counsel. In due course the court found itself in agreement with the State that the decision not to call witnesses the likes of those proffered to

testify in accordance with the unsworn statements did not violate the standard of Risher v. State, 523 P.2d 421 (Alaska 1974). Indeed that choice, in my judgment, lay well within the range of decisions which might be expected to be made by skilled and experienced trial counsel.

Whether defendant's counsel breached his Risher duty by failing to locate and interview all the potential observers of this killing presented another question. The Court did not adopt the State's position that failure to investigate can be justified because defendant failed to fund retained counsel's investigative effort (assuming that to be the case here). Arnold v. State, 685 P.2d 1261, 1266 n.2 (Alaska App. 1984). However, the Court is aware of the trial record which reveals that the

patrons of the after-hours club immediately fled the scene of the shooting, virtually hurdling the body of the dying victim in their haste to disassociate themselves with the tragedy. Surely, their unwillingness to be interviewed was known to defendant who was acquainted with most or many of them, and this intelligence certainly was conveyed to his attorney. The Court concluded and still believes that the decision not to trace and interview patrons was, again a decision within the permitted range of Risher.

Finally, this court has considerable concern over the rapid development of the newly emerging issue of last resort, ineffective assistance of counsel. The Courts, even in their proper concern for the defendant's right of fair trial, should guard against the "perilous

process of second guessing" as condemned in People v. Pope, 590 P.2d 859, 867 (Cal. 1979). Although Pope was cited and quoted with approval in Barry, supra at 1296, the obverse of the following thesis, the admonition is as valid in the present context as in the former.

Seldom in the realm of human endeavor will any task be accomplished with such perfection that it can withstand ruthless dissection and intense partisan scrutiny under the pitiless and all-revealing illumination of hindsight. Particularly this is true where the process is repeated in renewed motions such as is the case here.

In short, there was a hearing, defendant made his record, counsel were heard and the Court has ruled. If the Court's failure to provide a memorandum decision or specific findings rendered the

Court of Appeals unsure whether the denial of defendant's motion was for technical or substantive reasons, the foregoing should clarify that point.

Counsel are advised that I am tentatively prepared to view this Memorandum supplementing this Court's November 6, 1984 Order as compliance with the higher court's requirement upon remand, and deny defendant's request for further hearing. This would place the issue of sufficiency of the former hearing respectfully but squarely before the Court of Appeals. So that I may have the benefit of counsel's thinking on these issues, however,

IT IS ORDERED:

1. That defendant shall move for a one-hour supplemental hearing, stating with particularity the issues he intends to address accompanied by offers

of proof as to the nature of the testimony he seeks to elicit and the witnesses through whom he would seek to introduce it;

2. That the State shall either oppose or join in the motion, and specifically address the admissibility and relevance of the proffered proof as well as the merits of the Motion for Supplemental hearing;

3. That, the State shall brief and come prepared to advise the Court thoroughly as to the basis and rationale for its concession on appeal that this Court's former dismissal/denial was erroneous; and

4. That if reference must be made to earlier pleadings or the record of former proceedings those matters may be attached as exhibits, but may not simply be incorporated by reference.

DATED at Anchorage, Alaska this
23nd day of December, 1985.

/S/

J. JUSTIN RIPLEY
Superior Court Judge

I certify that on 1/6/86
a copy of the above was mailed/
hand delivered to each of the
attorney and/or individuals at
their addresses of Record.

/S/

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

MEMORANDUM AND ORDER

In an attempt to clarify the post conviction proceedings in this case the Court issued its order of December 23, 1985. From the positions developed in the parties' subsequent pleadings it now appears that the Court's expectations were not practical and the intended simplification process was not workable.

Further, since the time this Court expressed its willingness to have its

December 23, 1985 Memorandum and Order presented to the Court of Appeals to cure the Rule 35(h)(2) defect, I have discovered that this process was suggested to that Court at page 9 of Appellee's Brief. The Court of Appeals in their Opinion declined to accept the State's suggestion. This Court, therefore, withdraws its proposal stated at page 3, paragraph 4 of the December 23, 1985 Memorandum and Order

Since the parties now disagree as to whether the defendant's record to this point has made out a prima facie case of ineffective assistance the Court finds it necessary to clarify that issue. I find defendant has not done so, and that the State's objections to the unsworn statements and affidavits presented are well taken. Whether the State waived these objections by failing to raise them

when the matter was originally argued, or whether the Court of Appeals, by its October 23, 1985 observation that a Barry hearing appeared to be required, intended to announce that a prima facie showing had been made are matters that have concerned this Court. Upon reflection, it is concluded that neither was the waiver, if any, effective, nor did the Court of Appeals establish the sufficiency of defendant's record to this point. Absent a specific directive to the contrary, it is most unlikely that the Court of Appeals intended to ignore the clear and mandatory language of Barry v. State, 675 P.2d 1292, 1294-1296 (Alaska App. 1984) and Hampton v. Huston, 653 P.2d 1058, 1060 (Alaska App. 1982) requiring affidavits upon personal knowledge. Therefore,

IT IS ORDERED that defendant's Motion to Calendar an Evidentiary Hearing and

Motion for an Order Directing Presence of
Defendant are deemed Motions for Post
Conviction Relief pursuant to Crim. Rule
35(c) and are DENIED without prejudice.

DATED at Anchorage, Alaska this 21st
day of February, 1986.

/S/J. Justin Ripley
Superior Court Judge

EXHIBIT G.

PORTIONS OF TRANSCRIPT OF
EVIDENTIARY HEARING REGARDING
MOTION FOR NEW TRIAL HELD
FEBRUARY 25, 1987 PURSUANT TO
REMAND OF COURT OF APPEALS OF
THE STATE OF ALASKA, FILE NO. A-
805

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING REGARDING
NEW TRIAL
Wednesday, February 25, 1987,
2:45 p.m.
Anchorage, Alaska

DIRECT EXAMINATION OF GEORGE C. HOWARD

Q All right, Mr. Howard, there were -- there was no request made of record for instructions with respect to lesser included offenses or -- or other related offenses. Is there -- is there a reason that you chose not do that?

A Yes. It was a judgment call. In my opinion, Mr. Flippin, this was one of the strongest cases I've seen for-- for self-defense. I just did not think it wise for Mr. Jackson to gamble the jury returning a verdict finding him with some lesser offense. I was just -- I was satisfied that -- that the thing to do was to have the jury to call this case as a murder or let him go.

Q 'Kay. Mr. Howard, every single one of the witnesses in this case are-- are black.

CROSS EXAMINATION OF GEORGE C. HOWARD

Q Mr. Gregory Jackson also writes, "At no time did Mr. Howard discuss with me" -- the next paragraph -- "a jury instruction on manslaughter or any other lesser included offense. At no time did I authorize him not to do so."

Paragraph 7: "At no time did Mr. Howard discuss with me foregoing instructions with respect to the defense of provocation and heat of passion. At no time did I authorize him not do so."

A As to the lesser inclu -- .

Q Yeah, let me ask a question.

A All right.

Q In the ordinary course of -- of our representing criminal defendants, do you -- do you engage them in decisions about lesser included defense --

A Yes.

Q -- instructions or heat of

passion instructions?

A Yes.

Q Did you in this case?

A I spoke to Mr. Jackson about the lesser included offense, but I quite frankly tell you that because of my strong feelings concerning the facts in the case, I did not put a great deal of emphasis upon it and I did not urge him to -- to do that. I recall mentioning it to him and I was satisfied that I was making the best judgment call when we decided on proceeding with the lesser included offense.

Page 31, Lines 3-25 and Page 32, Lines 1-5

EXHIBIT H.

AFFIDAVIT OF GEORGE C. HOWARD,
ESQ., TRIAL COUNSEL AS TO
INEFFECTIVE ASSISTANCE OF
COUNSEL DATED SEPTEMBER 26, 1986

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF GEORGE C. HOWARD, ESQ.

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

George C. Howard, first duly sworn
upon oath, deposes and states:

1. I am an attorney licensed to
practice law in the state of Illinois
since 1962.

2. I was Gregory Jackson's trial counsel in the above-referenced case. In that capacity I filed pre-trial discovery motions, serving them on the State of Alaska by U.S. mail well before the scheduled trial date. However, the State did not respond until the night before jury selection. A grand jury transcript was not provided until trial had actually begun, at which time I was afforded only a few minutes to read key testimony by the State's eyewitness.

3. Under these circumstances I nevertheless elected to proceed with trial based on my experience with similar cases I have tried in Illinois, and particularly in the city of Chicago. That decision was in part due to the fact that I am not admitted to practice in Alaska and am not familiar with local rules of procedure, nor do I have any detailed knowledge of

Alaska Criminal Law. I felt, however, that a trial is a trial whether in Alaska, or Chicago, and yielded to pressures to proceed with trial exercised by the State, the Bench and the general calendaring system in Anchorage, electing to rely on my experience in successfully defending similar cases.

4. Gregory Jackson has obviously suffered as a result of my miscalculations. In retrospect there is no doubt I should have moved for a continuance to better prepare this case, particularly with respect to an investigation geared toward finding witnesses who could support Mr. Jackson's version of the incident that led the charges against him, who could confirm the decedent's propensity for aggressiveness, and who might rebut, impeach or contradict the State's

witnesses.

5. I am familiar with general principles of law regarding impeachment of witnesses, instructions relating to lesser included offenses, self defense and other defenses to murder charges; however I am not familiar with Alaska law in any of these areas. For example, I was uncertain how issues such as provocation and heat of passion should be argued, or if they warranted a separate instruction.

6. Upon reflection it is clear to me these matters rendered my presentation of Mr. Jackson's case ineffective, and that he was certainly prejudiced thereby.

7. This affidavit is intended to supplement and expand on that affidavit previously submitted by me dated March 27, 1986.

DATED: 9/26/86 /S/ GEORGE C. HOWARD

SUBSCRIBED AND SWORN to before me

this 26th day of September, 1986.

/S/ CHERYL D. WELLINGTON
Notary Public in and for Illinois
My Commission expires: 8/26/90

EXHIBIT I.

MOTION FOR POST-CONVICTION
RELIEF BASED ON INEFFECTIVE
ASSISTANCE WITH SUPPORTING
AFFIDAVITS DATED JUNE 4, 1986
INCLUDING AFFIDAVIT OF
PETITIONER GREGORY JACKSON
[MOTION AND AFFIDAVITS FILED
AFTER REMAND OF THE ALASKA COURT
OF APPEALS IN CAUSE NO. A-805
AND AFTER SUPERIOR COURT
DISMISSED, ON FEBRUARY 21, 1986,
MOTION FOR POST-CONVICTION
RELIEF WITHOUT PREJUDICE]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)

)

Plaintiff,)

)

vs.)

)

GREGORY JACKSON,)

)

Defendant.)

)

Case No. 3ANS-83-7223 CR

MOTION FOR POST-CONVICTION RELIEF
BASED ON INEFFECTIVE ASSISTANCE OF
COUNSEL AND MOTION TO CALENDAR
EVIDENTIARY HEARING RELATING THERETO

Pursuant to this Court's "without

"prejudice" Order of February 21, 1986,
defendant hereby renews his motion for
Post-Conviction Relief seeking a new trial
based on ineffective assistance of
counsel, and for an Evidentiary Hearing
relating thereto.

These motions are based on all
matters of record herein, and particularly
the formalized affidavits of the following
persons, each of which is attached and
made a part hereof:

1. George C. Howard
2. Gregory Jackson
3. Hurist Joubert
4. Tyrone Brown
5. Larry Cleveland
6. Louis Howard
7. Calvin Chatman
8. John Hurd

These motions are further based on
the Memoranda filed in connection with

defendant's earlier Rule 35 Motions, which documents are matters of record and appropriate for Judicial Notice, which is hereby formally requested.

DATED this 4th day of June, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy
of the foregoing was mailed
to Robert D. Bacon, Assistant
Attorney General, on this
4th day of June, 1986.

/S/ THOMAS A. FLIPPEN, II

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

GEORGE C. HOWARD, first being
duly sworn upon oath, deposes and says:

1. That my name is GEORGE C.
HOWARD, of 188 West Randolph Street,
Chicago, Illinois.

2. That I am a lawyer,
licensed to practice in the State of
Illinois, and have been so licensed since
1962.

3. That I was the trial lawyer
for the defendant, GREGORY JACKSON, in the
case of State of Alaska vs. Gregory
Jackson, 83-07223-1.

4. That pursuant to my duties
of Mr. Jackson's lawyer, I filed pre-trial
discovery motions and served same upon the
State.

5. The discovery materials

were not turned over to me until a few hours before the trial began.

6. A request had been made to have the discovery materials sent to my office in Chicago, Illinois, long before the trial began.

7. That no investigation was made by my office prior to the trial because the State did not furnish me with a list of witnesses, their statements, police reports, and other matters until the night before the trial.

8. That certain reports, including grand jury testimony, was not given to me until we were in the midst of trial, and only a few minutes were afforded to read same.

9. Affiant further states that a more adequate job of cross-examining the eye-witness for the State would have been done if the discovery material had been

furnished in sufficient time to make an investigation.

10. Affiant states that rather than proceeding with the trial, without an investigation after receiving the discovery material, he should have moved for a continuance in the case for reason of further and better preparation.

FURTHER, Affiant says not.

/S/ George C. Howard
Affiant

Subscribed and Sworn
to before me this
27th day of March, 1986.

/S/ Notary Public
My Commission Expires:
Dec., 18, 1988

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF GREGORY JACKSON IN
SUPPORT OF MOTION FOR
NEW TRIAL/POST-CONVICTION RELIEF

STATE OF INDIANA)
) ss.
COUNTY)

Gregory Jackson first duly sworn upon
oath deposes and states:

1. I am the defendant named above.

At trial I was represented by George C.
Howard, Jr., an attorney from Chicago,
Illinois.

2. I conferred with Mr. Howard for

no more than approximately one hour when he appeared with me at my arraignment in Anchorage, Alaska. At that time I related to him the events that I subsequently testified to at trial.

3. I did not see Mr. Howard again, or otherwise communicate with him, until the day jury selection began in my trial. During one of the breaks he specifically told me he had never received any police reports or other materials regarding my case until they were delivered to him at his hotel room in Anchorage the evening before jury selection began. He did not review a grand jury transcript in this matter until the Court recessed trial for him to do so.

4. Mr. Howard repeatedly told me, "you will be home soon", and that he undertook no investigation in this case because he regarded the facts as too weak

to support a conviction.

5. When I asked him how he located the only witness called on my behalf, a person also named Jackson, he specifically told me it was because he happened to have overheard the witness talking about the case outside the Courtroom, and that this encounter was strictly inadvertent.

6. At no time did Mr. Howard discuss with me any decision not to seek a jury instruction on manslaughter or any other lesser included offense. At no time did I authorize him not to do so.

7. At no time did Mr. Howard discuss with me foregoing instructions with respect to the defenses of provocation and heat of passion. At no time did I authorize him not to do so.

8. At no time did I specifically question Mr. Howard about any of these matters. Quite simply, he was the

attorney and I assumed he knew what he was doing. Anytime I in fact asked a question the consistent reply was words to the effect, "Don't worry, you'll be home soon."

DATED: 3/20/86 /S/ GREGORY JACKSON

SUBSCRIBED AND SWORN to before me
this 20th day of March, 1986.

/S/
Notary Public in and for Indiana
My Commission Expires: 6/29/88

I certify that a copy of the
foregoing was mailed to Robert D.
Bacon, Assistant Attorney General,
on this 4th day of February, 1986.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF HURIST JOUBERT

STATE OF ALASKA)
)
)ss.
THIRD JUDICIAL DISTRICT)

Hourist Joubert, first duly sworn
upon oath deposes and states:

1. My name is Hurist Joubert. I
have known Albert Ford for approximately
two years and although we were not the
best of friends, we were close
acquaintances.

2. A couple of days after the

Jackson shooting I discussed the incidents with Ford. Ford stated that Jackson asked for it the night of the shooting. I asked Ford to clarify that statement and he stated that Vernon Jackson physically pressed the attack and forced Greg Jackson to protect himself. The bathroom was very small at Newkirks and Ford further indicated that Greg Jackson had no other way out.

3. At that time Ford had not been contacted by the authorities and he said that he would like to leave the state before the police talked to him because he did not want any involvement. He again told me Vernon Jackson had asked for it that night and further stated that under the same circumstances he would have shot Jackson. He said that he knew that he would be coerced to cooperate due to his criminal record. I advised him not to

run, that this was a murder case and that the authorities would locate him regardless.

4. The following day Ford told me that a representative from the District Attorney's Office and a police investigator talked to him. They told him that if he did not cooperate fully with them that charges would be filed against him. Ford is a heavy cocaine user who steals meat to support his habit.

5. On the day of the grand jury hearing I drove to the courthouse to give Al a ride home. When I arrived there the waiting room was filled with members of the black community, all of which I knew. Things proceeded slower than I thought they would and I was at the courthouse for over two hours. During that time, Alonzo Lang, the doorman at Newkirks, Al Ford, and myself talked about the testimony they

were about to give. Both Lang and Ford stated that pressure had been applied by the D.A.'s Office and APD to testify favorably on behalf of the State.

DATED: 4/15/86 /S/ HURIST JOUBERT

SUBSCRIBED AND SWORN to before me this 15th day of April, 1986.

/S/

Notary Public in and for Alaska
My Commission Expires: AS 33 30 190

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
_____)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF TYRONE BROWN

STATE OF _____)
) ss.
COUNTY)

Tyrone Brown, first duly sworn upon
oath deposes and states:

1. My name is Tyrone Brown and I
lived in Anchorage since 1978. I first
met Vernon Jackson while in the army. We
were stationed at Ft. Richardson and
assigned to the same unit (B.C. 1/60
Inf.).

2. Jackson dealt cocaine while in the army and expanded his cocaine activities significantly after his discharge. As a matter of fact, he was one of the biggest narcotics dealers in the black community. Jackson was a violent man who most always carried a gun and he would not hesitate to use physical force when he felt it was necessary.

3. A couple of years ago I had to send my girlfriend to Hawaii for two weeks because her brother had some trouble with one of Jackson's friends and he (Jackson) threatened to harm her. I took the threat seriously and that is why I sent her away.

4. In 1982 Jackson asked me to sell cocaine for him, but I refused because I knew that someone would kill him sooner or later either because of his cocaine involvement or because of his violent temper.

DATED: 3/30/86 /S/ TYRONE BROWN

SUBSCRIBED AND SWORN to before me
this 30th day of March, 1986.

/S/
Notary Public in and for Wisc.
My Commission Expires: 11/5/89

State of Wis.

County of Adams

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF LARRY CLEVELAND

STATE OF _____)
)
)ss.
_____ COUNTY)

Larry Cleveland, first duly sworn
upon oath deposes and states:

1. My name is Larry Cleveland and I
lived in Anchorage, Alaska since 1957 off
and on.

2. I first met Vernon Jackson in
1978/79. He was a big narcotics dealer in
the black community and I used to buy

qualities of cocaine from him myself. One time I wanted to purchase about \$800 of cocaine and I had to stand in line. On some days Jackson would turn between \$4,000 and \$5,000 worth of cocaine.

3. Jackson carried a gun on many occasions, and I for one, believed he would use it. Violence was a part of Jackson's life and considering the business he was in it was just a matter of time before serious trouble came his way.

4. I have been in Newkirks on many occasions and it would be almost impossible to hear a conversation taking place in the bathroom if you were standing outside because the jukebox is almost always going and it is usually turned up very loud.

DATED: 3/4/86 /S/ LARRY CLEVELAND

SUBSCRIBED AND SWORN to before me this 5th day of March, 1986.

/S/

Notary Public in and for Alaska
My Commission Expires: 7/19/88

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF LOUIS HOWARD

STATE OF ALASKA)
)
)ss.
THIRD JUDICIAL DISTRICT)

Louis Howard, first duly sworn upon
oath deposes and states:

1. My name is Louis Howard and I
have known Vernon Jackson for over two
years. I am a disc jockey at the Kamane
Lounge, a black night-spot in Fairview.
Jackson was one of the biggest narcotics
dealers in Anchorage, was a violent man.

and almost always carried a gun.

2. On the morning of his death, Jackson was in the Kamane Lounge drinking Hennessy with a beer back. Jackson most always had friends with him and this morning there were four people that I can remember with him.

3. One of these friends, Mary Stills, told me that when Jackson entered Newkirks he did not have his gun with him because she had one in her purse and the other two people with them, Jesse and Ed had weapons with them. She stated that after a very short period of time Jackson returned to his car for his weapon. Mary says she knows he returned for his gun because when he came back into Newkirk's Jackson complained about the gun in the left inside pocket of his jacket next to his chest. He usually carried his gun in the front of his pants, but the metal was

cold that morning and maybe that is why he placed it into his jacket pocket.

4. I once lived with Albert Ford in 1982 for about four months. Al was a cocaine/heroin junkie and because he stole meat for dope he was known by the street community as the meat man.

DATED: 4/11/86 /S/ LOUIS HOWARD

SUBSCRIBED AND SWORN to before me this _____ day of February, 1986.

/S/ Ernest _____
Acting Superintendent
AS AUTHORIZED UNDER
A.S. 33.30.190

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF CALVIN CHATMAN

STATE OF ALASKA)
)
)ss.
THIRD JUDICIAL DISTRICT)

Calvin Chatman, first duly sworn upon
oath deposes and states:

1. My name is Calvin Chatman and I
have lived in Anchorage, Alaska since
1976.

2. I first met Vernon Jackson while
in the army at Ft. Richardson in 1977. I
was assigned to H.Q. 1/60 Inf. and Jackson

was in B.Co. 1/60 Inf. 172 BDE. At that time Jackson was selling between three and four thousand dollars worth of cocaine a month. I know this because I was purchasing three to four hundred dollars worth of cocaine a month and I was just one of many customers. Jackson was a big man and used his size to intimidate people. He was a violent man and would not hesitate to become physical.

3. I was discharged from the army at Ft. Riley, Kansas in 1981 and returned to Anchorage where I resumed contact with Jackson. He was still in the cocaine business and was one of the biggest suppliers of cocaine in the black community. I would estimate that he was selling \$10,000 worth each month. Jackson was also pimping. He was running three to five girls and at fifty to three hundred and fifty dollars a pop he did well.

Jackson almost always carried a gun and displayed it on occasion.

4. On the night that Jackson was killed I was in Newkirks which is an after-hours place in Fairview. Newkirks is a small residence. The place was crowded and most everyone was drinking and using cocaine. The jukebox was on and very loud. It would be almost impossible to overhear a conversation taking place in the bathroom due to the loud music and the many conversations taking place. At approximately 3:00 a.m. Jackson came into Newkirks, said something to Greg Jackson's girlfriend and went into the bathroom. I'm not sure what happened after that, but I heard shots fired in the bathroom and moments later I went to the bathroom to see what had happened. I saw Jackson on the floor and old man Newkirk and a man called Dancing Bobby going through his

pockets. I thought it was kind of cold that those two people were ripping off a man who was still twitching, but then again Jackson was the type of person who most everyone tolerated out of fear. I had a feeling that Jackson would come to an untimely end because of his activities and his violent manner.

DATED: 6/2/86 /S/ CALVIN CHATMAN

SUBSCRIBED AND SWORN to before me
this 2nd day of June, 1986.

/S/

Notary Public in and for Alaska
My Commission Expires: 8/14/88

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3ANS-83-7223 CR

AFFIDAVIT OF JOHN HURD

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

JOHN HURD, first duly sworn upon oath
deposes and states:

1. I am a private investigator
licensed as such by the State of Alaska.
I have been retained by the firm of Boyko,
Davis & Dennis for sometime now with
respect to Gregory Jackson's case, and
personally spoke with Hurist Joubert,

Tyrone Brown, Larry Cleveland, Louis Howard and Calvin Chatman. The statements they signed, which now appear in full affidavit form, were true and correct summaries of the statements they gave to me. In each case I presented those written summaries to each of them, read the statements with each person, asked them if they fully understood the statement and if it correctly reflected their recollection of the incidents related therein, observed each such person to indicate affirmatively, and further observed each such person to sign and date his statement in my presence.

2. By way of further investigation into this matter I undertook efforts to locate one Mary Stills. I know her whereabouts and will be able to personally serve her with a subpoena requiring her to appear at any Evidentiary Hearing

scheduled in this case.

3. I did not attempt to take a formal statement from her as it is apparent she is a hostile and uncooperative witness. I did not want to alienate her or provide her any reason to flee or secrete herself.

DATED: 6/2/86 /S/ JOHN HURD

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1986.

/S/

Notary Public in and for Alaska
My Commission Expires: 12/10/86

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General, on this 4th day of June, 1986.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT J.

MOTION FOR NEW TRIAL AND
SUPPORTING DOCUMENTS AS TO
INEFFECTIVE ASSISTANCE OF
COUNSEL AND OTHER MATTERS DATED
AUGUST 21, 1984

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)

Case No. 3AN-S83-7223 Cr.

MOTION FOR NEW TRIAL

Defendant, by and through his counsel
of record, hereby moves this Court for all
orders necessary to grant a new trial.

This motion is based on defendant's
contention his conviction was the result
of ineffective assistance of counsel, due

primarily to trial counsel's failure to investigate and to prepare defendant's case as more particularly set forth in the Memorandum of Points and Authorities served and filed herewith; on the attached affidavit of present counsel and on all matters of record herein.

This motion is brought pursuant to the provisions of Criminal Rule 35(c) (1) in that the ineffective assistance of counsel constitutes a violation of defendant's right under the Sixth Amendment to the United States Constitution and Article I, Sec. 7 of the Alaska Constitution; the provisions of Rule 35(c) (4) in that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice, and as more particularly evidenced by the

attached witness statements, none of whom were ever contacted by prior defense counsel; and pursuant to the provisions of Rule 35(c) (6) in that the conviction is otherwise subject to collateral attack regarding the issue of ineffective assistance of counsel as heretofore available by Writ of Habeas Corpus.

DATED this 21st day of August, 1984.

BOYKO, DAVIS & DENNIS

By: /S/THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was hand delivered to Gail Roy Fraties, Esq. this 21st day of August, 1984.

/S/THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT
ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,))
)
vs.))
)
GREGORY JACKSON,))
)
Defendant.))
)

Case No. 3AN-583-7223 Cr.

AFFIDAVIT OF THOMAS A. FLIPPEN, II

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THOMAS A. FLIPPEN, II, being first
duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to
practice law before all courts in the
states of Alaska and California, United
States District Courts for the District of
Alaska and the Northern District of
California, the United States Court of

Appeals for the Ninth Circuit and the United States Supreme Court. I am an associate with Boyko, Davis & Dennis, defense counsel of record herein, and have been assigned primary responsibility for legal services rendered in this matter relating to sentencing and appeal. As a result of this assignment, I have become thoroughly familiar with all aspects of the case after having read transcripts of all proceedings through and including final argument at trial.

2. I have personally discussed this case on several occasions with Assistant District Attorney Gail Roy Fraties, trial counsel of record on behalf of the State of Alaska. From time to time I have personally informed him, and discussed with him in detail, the identity of those persons whose statements are attached hereto, and the nature and substance of

their statements.

3. Mr. Fraties has authorized me to state on his behalf that no discovery materials were requested by prior defense counsel herein until the day before jury selection began, and that once requested they were immediately provided.

4. In making final preparation for the presentation of his case, Mr. Fraties discovered that a copy of the grand jury transcript had not been requested by prior defense counsel. He therefore directed that efforts be made throughout the evening hours preceding the commencement of trial to deliver said transcripts by attempting to contact prior defense counsel at his room in the Captain Cook Hotel, where he had previously indicated he would be staying during the course of trial. These efforts were unsuccessful.

5. Mr. Fraties stated he was not

able to deliver the said grand jury transcripts to prior defense counsel until the day jury selection began. Please also see Tr. 179:13-25; 184:1-13; 257-15:258:16.

6. Although not specifically mentioned in the statements of witnesses attached hereto, I am personally aware that none of these persons was contacted by anyone in connection with this case prior to the time they were interviewed by John Hurd, an investigator retained by my office in an effort to locate and interview these persons. It is a matter of record that none of these persons were ever called to testify at the trial herein.

/S/ THOMAS A. FLIPPEN, II

SUBSCRIBED AND SWORN TO before me this 21st day of August, 1984.

/S/ Notary Public in and for Alaska
My Commission Expires: 9/9/84

I certify that a copy of the foregoing
was hand delivered to Gail Roy Fraties,
Esq. this 21st day of August, 1984.

/S/ THOMAS A. FLIPPEN, II

STATEMENT OF LARRY CLEVELAND

My name is Larry Cleveland and I have lived in Anchorage since 1957 off-and-on. I first met Vernon Jackson in 1978/79. He was a big narcotics dealer in the black community and I used to buy quantities of cocaine from him myself. One time I wanted to purchase about \$800.00 of cocaine and I had to stand in line. On some days Jackson would turn between \$4000 and \$5000 worth of cocaine. Jackson carried a gun on many occasions and I, for one, believed he would use it. Violence was a part of Jackson's life and considering the business he was in it was just a matter of time before serious trouble came his way.

I have been in Newkirk's on many occasions and it would be almost impossible to hear a conversation taking place in the bathroom if you were standing

outside because the jukebox is almost always going and it is usually turned up very loud.

DATED this 13 day of July, 1984.

/S/LARRY CLEVELAND

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

STATEMENT OF TYRONE BROWN

My name is Tyrone Brown and I have lived in Anchorage since 1978. I first met Vernon Jackson while in the army. We were stationed at Fort Richardson and assigned to the same unit (B.Co. 1/60 Inf.). Jackson dealt cocaine while in the army and expanded his cocaine activities significantly after his discharge. As a matter of fact, he was one of biggest narcotics dealers in the black community. Jackson was a violent man who most always carried a gun and he would not hesitate to use physical force when he felt it was necessary. A couple of years ago I had to send my girlfriend to Hawaii for two weeks because her brother had some trouble with one of Jackson's friends and he (Jackson) threatened to harm her. I took the threat seriously and that is why I sent her away. In 1982 Jackson asked me to sell cocaine

for him, but I refused because I knew that someone would kill him sooner or later either because of his cocaine involvement or because of his violent temper.

DATED this 13 day of July, 1984.

/S/TYRONE BROWN

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission expires: 9/9/84

STATEMENT OF LOUIS HOWARD

My name is Louis Howard I have known Vernon Jackson for over two years. I am a disc jockey at the Kahame Lounge, a black night-spot in Fairview. Jackson was one of the biggest narcotics dealers in Anchorage, was a violent man, and most always carried a gun.

On the morning of his death, Jackson was in the Kahame Lounge drinking Hennessey with a beer back. Jackson most always had friends with him and this morning there were four people that I can remember with him. One of these friends, Mary Stills, told me that when Jackson entered Newkirks he did not have his gun with him because she had one in her purse and the other two people with them, Jesse and Ed had weapons with them. She stated that after a very short period of time Jackson returned to his car for his

weapon. Mary says she knows he returned for his gun because when he came back into Newkirk's Jackson complained about the gun being so cold. It was November and Jackson had the gun in the left inside pocket of his jacket next to his chest. He usually carried his gun in the front of his pants, but the metal was cold that morning and maybe that is why he placed it into his jacket pocket.

I once lived with Albert Ford in 1982 for about four months. Al was a cocaine/heroin junky and because he stole meat for dope he was known by the street community as the meat man.

/S/LOUIS HOWARD

This statement was read and signed in my presence.

/S/JOHN HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

STATEMENT OF HURIST JOUBERT

My name is Hurist Joubert. I have known Albert Ford for approximately two years and although we were not the best of friends, we were close acquaintances. A couple of days after the Jackson shooting I discussed the incidents with Ford. Ford stated that Jackson asked for it the night of the shooting. I asked Ford to clarify that statement and he stated that Gregory Jackson was attempting to back out of the situation but that Vernon Jackson physically pressed the attack and forced Greg Jackson to protect himself. The bathroom was very small at Newkirk's and Ford further indicated that Greg Jackson had no other way out. At that time Ford had not been contacted by the authorities and he said that he would like to leave the state before the police talked to him because he did not want any involvement.

e again told me Vernon Jackson had asked
or it that night and further stated that
nder the same circumstances he would have
hot Jackson. He said that he knew that
e would be coerced to cooperate due to
is criminal record. I advised him not to
un, that this was a murder case and that
he authorities would locate him
egardless.

The following day Ford told me that a
epresentative from the District
Attorney's Office and a police
nvestigator talked to him. They told him
hat if he did not cooperate fully with
hem that charges would be filed against
him. Ford is a heavy cocaine user who
steals meat to support his habit.

On the day of the grand jury hearing
I drove to the courthouse to give Al a
ride home. When I arrived there the
waiting room was filled with members of

the black community, all of which I knew. Things proceeded slower than I thought they would and I was at the courthouse for over two hours. During that time, Alonzo Long, the doorman at Newkirks, Al Ford, and myself talked about the testimony they were about to give. Both Lang and Ford stated that pressure had been applied by the D.A.'s office and APD to testify favorably on behalf of the state.

This statement was taken at the Cook Inlet Pretrial Facility by John E. Hurd.

/S/HURIST JOUBERT

This statement was read and signed in my presence.

/S/JOHN E. HURD

SUBSCRIBED AND SWORN to before me this 20th day of August, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 9/9/84

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
s.)
)
REGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

AFFIDAVIT OF JOHN E. HURD

STATE OF ALASKA) -
) ss.
THIRD JUDICIAL DISTRICT)

I, JOHN E. HURD, being first duly
sworn, depose and state that:

1. I am a private investigator
licensed by the State of Alaska.
2. I have been retained by Boyko,
Davis & Dennis to assist with the
investigation of Mr. Jackson's case. In
connection with those duties I have had

frequent contact with Thomas A. Flippin,
II in his capacity as substituted defense
counsel, and with defendant Gregory
Jackson.

3. Pursuant to my review of the case
and discussion with Mr. Flippin and Mr.
Jackson, I personally interviewed Hurist
Joubert, Louis Howard, Larry Cleveland,
Tyrone Brown and Calvin Chatman. In the
course of each interview it became obvious
and otherwise clearly apparent that none
of these persons had previously been
contacted or spoken to about the case by
either the police or any person from Mr.
Jackson's defense team. I may have
specifically asked some of these persons a
direct question to that effect, but I have
no recollection of which person or on
which occasion.

Dated this 20th day of August, 1984.

/S/John E. Hurd

SWORN AND SUBSCRIBED to before me
this 20th day of AUGUST, 1984.

/S/Notary Public in and for Alaska
My Commission Expires: 1/17/86

EXHIBIT K.

NOTICE OF MERIT AND SENTENCE
APPEAL AND STATEMENT OF POINTS
ON APPEAL TO THE COURT OF
APPEALS OF THE STATE OF ALASKA
DATED APRIL 21, 1987 AFTER FINAL
DENIAL ON APRIL 7, 1987 BY
SUPERIOR COURT OF RELIEF
REQUESTED [RESULTING IN ALASKA
COURT OF APPEALS FILE NO. A-
2026, OPINION NO. 781]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

Gregory Jackson
c/o Cook Inlet Pretrial Facility
1300 E. 4th Avenue
Anchorage, Alaska 99501

NOTICE OF MERIT
AND SENTENCE APPEAL

Defendant, by and through his counsel of record, hereby gives notice that he appeals to the Alaska Court of Appeals from this Court's denial of his motion for a new trial based on ineffective assistance of counsel, together with the Findings of Fact and Conclusions of Law in support of said denial, dated April 7, 1987.

Defendant further appeals from his sentence herein as excessive under the circumstances of his case.

DATED this 21st day of April, 1987.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Leonard M. Linton, Assistant District Attorney, and the Attorney General in Juneau, on this 21st day of April, 1987.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

STATEMENT OF POINTS ON APPEAL

Defendant intends to rely on the following points with respect to his appeal, notice of which is served and filed herewith:

1. Defendant was denied effective assistance of counsel at trial and is therefore entitled to a new trial.

2. It was error for the trial court to deny defendant's motion for a new trial based on ineffective assistance of counsel.

3. The trial court's Findings

of Fact and Conclusions of Law were clearly erroneous and do not support the denial of defendant's motion for a new trial based on ineffective assistance of counsel.

4. The sentence herein was excessive and otherwise clearly mistaken based on the facts of this case.

DATED this 21st day of April, 1987.
BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Leonard M. Linton, Assistant District Attorney, and the Attorney General in Juneau, on this 21st day of April, 1987.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT L.

NOTICE OF APPEAL AND STATEMENT
OF POINTS ON APPEAL TO THE
COURT OF APPEALS OF THE STATE OF
ALASKA DATED MARCH 21, 1986
AFTER DENIAL ON FEBRUARY 21,
1986 BY SUPERIOR COURT WITHOUT
PREJUDICE RELIEF SOUGHT IN
MOTION FOR NEW TRIAL [EXHIBIT F
HEREWITH] RESULTED IN APPEAL NO.
A-1471]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3AN-S83-7223 Cr.

NOTICE OF APPEAL
(Appellate Rule 204(b))

Defendant hereby appeals to the Court
of Appeals from this Court's Memorandum
and Order dated February 21, 1986, denying

defendant's Rule 35(c) Motion for Post Conviction Relief based on ineffective assistance of counsel and for an evidentiary hearing with respect thereto, and the subsequent denial of a Motion to Reconsider dated March 4, 1986.

DATED this 21st day of March, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General and Office of the Attorney General in Juneau, on this 21st day of March, 1986.

/S/ THOMAS A. FLIPPEN, II

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
_____)

Case No. 3AN-S83-7223 Cr.

STATEMENT OF POINTS ON APPEAL
(Appellate Rule 210(e))

Defendant raises the following points
on appeal:

1. After finding that written statements offered by defendant in support of his new trial motion were technically deficient, it was error for the Trial Court not to permit an opportunity to present those statements in technically

correct affidavit form.

2. It was error for the trial court not to calendar an Evidentiary Hearing with respect to defendant's new trial motion based on ineffective assistance of counsel and pursuant to remand from the Court of Appeals in Memorandum Opinion and Judgment No. 959 dated October 23, 1985.

DATED this 21st day of March, 1986.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was mailed to Robert D. Bacon, Assistant Attorney General and Office of the Attorney General in Juneau, on this 21st day of March, 1986.

/S/ THOMAS A. FLIPPEN, II

EXHIBIT M.

NOTICE OF MERIT APPEAL AND
STATEMENT OF POINTS OF APPEAL
DATED JANUARY 11, 1985 TO THE
COURT OF APPEALS OF THE STATE OF
ALASKA AS TO INEFFECTIVE
ASSISTANCE OF COUNSEL AS A
RESULT OF DENIAL BY THE SUPERIOR
COURT OF MOTION FOR NEW TRIAL,
SAID DENIAL DATED NOVEMBER 6,
1984 [RESULTING IN APPEAL NO. A-
805]

IN THE SUPERIOR COURT

FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

NOTICE OF MERIT APPEAL
AND SENTENCE APPEAL

Defendant, by and through counsel of record, hereby gives notice that he appeals to the Alaska Court of Appeals.

from the Judgment of Conviction entered on December 14, 1984, from the denial of his Motion for a New Trial based on ineffective assistance of counsel and filed pursuant to the provisions of Criminal 35, and with respect to the sentence imposed herein as being excessive.

DATED this 11th day of January, 1985.

BOYKO, DAVIS & DENNIS

BY: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the foregoing was hand delivered to Gail Roy Fraties, Assistant District Attorney on this 11th day of January, 1985.

/S/ Thomas A. Flippen, II

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
GREGORY JACKSON,)
)
Defendant.)
)

Case No. 3ANS-83-7223 CR

STATEMENT OF POINTS ON APPEAL

Defendant raises the following points
on appeal:

- 1) His conviction was obtained in derogation of his Sixth Amendment right to effective assistance of counsel;
- 2) It was an error to deny Defendant's Motion for a new trial; and
- 3) The sentence of 50 years imposed herein pursuant to conviction for first degree murder was,

under the facts and
circumstances of this
case, excessive.

DATED this 11th day of January,
1985.

BOYKO, DAVIS & DENNIS

By: /S/
THOMAS A. FLIPPEN, II

I certify that a copy of the
foregoing was hand delivered to Gay Roy
Fraties, Assistant District Attorney
on this 11th day of January, 1985.

/s/ THOMAS A. FLIPPEN, II

EXHIBIT N.

CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES WHICH THE
CASE INVOLVES PURSUANT TO U.S.
SUPREME COURT RULE OF APPELLATE
PROCEDURE 21.7

CONSTITUTIONAL PROVISIONS

AMENDMENTS TO THE U.S. CONSTITUTION

ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE XIV.

Sec. 1. Citizenship rights not to be abridged by states. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS SEC. 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

- (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

ALASKA CONSTITUTION

Article I.

Declaration of Rights

Section 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons have corresponding obligations to the people and to the State.

Section 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Section 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may

provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ALASKA STATUTES

Sec. 11.41.100. Murder in the first degree. (a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, the person

(1) causes the death of any person;
or

(2) compels or induces any person to commit suicide through duress or

deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55 (Sec. 3 ch 166 SLA 1978).

Sec. 11.41.110(a)(1) reads in pertinent part:

(a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person. ...

Sec. 11.41.120(a)(1) provides in pertinent part:

(a) A person commits the crime of manslaughter if the person

(1) intentionally, knowingly, or recklessly causes the death of another

person under circumstances not amounting to murder in the first or second degree.

Sec. 11.41.115 provides in pertinent part:

(a) In a prosecution under AS 11.41.100(a)(1) or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

(e) Nothing in (a) or (b) of this section precludes a prosecution for or conviction of manslaughter or any other crime not specifically precluded.

(f) In this section,

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a

person who is intoxicated, under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not alone or in combination with each other, constitute serious provocation.

Sec. 11.81.335 provides in pertinent part:

Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent

(1) the use of nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self defense against death, serious physical injury, kidnapping, sexual assault in the first degree under AS

11.41.410(a)(1) or (2), sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating. . . .

CRIMINAL RULES

Rule 30. Instructions.

(a) Requested Instructions-- Objections. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the

requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. Additionally, the court in its discretion may give the jury such instructions it deems necessary, at any stage of the trial. The instructions shall be reduced to writing and read to the jury and shall be taken to the jury room by the jury. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objections. Opportunity shall be given to make the objection out of the hearing of the jury by excusing the jury or hearing objections in chambers.

(b) Instructions to Be Given. The

court shall instruct the jury on all matters of law which it considers necessary for the jury's information in giving their verdict.

(Amended by Supreme Court Order 222 effective December 15, 1975)

Rule 31. Verdict.

(c) Conviction of Lesser Offense.

The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or the offense necessarily included therein if the attempt is an offense. When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only.

EXHIBIT O.

PERTINENT PORTIONS OF
PETITIONER'S APPELLATE BRIEFING
FILED IN ALASKA COURTS
ADDRESSING ISSUES OF FAILURE TO
INSTRUCT ON MANSLAUGHTER AS A
LESSER INCLUDED OFFENSE AND
HEAT OF PASSION AS A DEFENSE.

A. PAGES, V. and 18-20 OF
APPELLANT'S OPENING
BRIEF IN GREGORY
JACKSON v. STATE OF
ALASKA, ALASKA COURT
OF APPEALS FILE NO. A-
805 of APRIL 16, 1985

IN THE COURT OF APPEALS FOR THE STATE OF
ALASKA

GREGORY JACKSON,)
)
Appellant,)
)
vs.)
)
STATE OF ALASKA,)
)
Appellee.)
)

Case No. A-805
Superior Court No. 3ANS-83-7223 CR

Appeal From Rulings By The Superior Court,
Third Judicial District at Anchorage,
Honorable J. Justin Ripley,
Denying Defendant's Motion For A New Trial
Based On Ineffective Assistance Of Counsel,
And Appeal From the Sentence Imposed

APPELLANT'S OPENING BRIEF

Attorney for
Defendant/Appellant
Thomas A. Flippin, II
BOYKO, DAVIS & DENNIS
733 W. 4th Ave., Suite 400
Anchorage, AK 99501
(907) 272-5464

/S/ THOMAS A. FLIPPEN, II

FILED _____
in the Court of Appeals For
The State of Alaska.

DAVID A. LAMPEN,
Clerk of the Appellate Court

Deputy Clerk

STATE OF ISSUES PRESENTED

1. Was Appellant denied effective assistance of counsel wherein trial counsel failed to investigate, failed to prepare, failed to request instructions on manslaughter as a lesser included offense and heat of passion as a defense, and failed to object to the Court's instruction that a unanimous acquittal was required before a lessor included offense could be considered? (emphasis added)

2. Was it error for the Trial Court not to hold a hearing with respect to appellant's ineffective assistance claim as required by Barry v. State, 675 P.2d 1292, 1295, (Ak. App. 1984)?

3. Was it error to deny Appellant's Motion For New Trial based on his allegation of ineffective assistance of

counsel?

-V-

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In addition to the errors and omissions discussed above, trial counsel failed to ask for any lesser included offense instructions on manslaughter or with respect to a heat of passion defense. Although an instruction was given by the Court on second degree murder as a lesser included offense of first degree murder, defense counsel failed to request modification of the standard Alaska pattern jury instruction which stated that jurors were required to acquit on the greater offense before considering the lesser.

It is literally Horn Book law that on an accusation of murder in the first degree a jury may properly find the

defendant guilty of a lesser degree of murder or manslaughter. Wharton; Criminal Procedure (12th Edition) Sec. 545, 580. A defendant is entitled to such lesser included offense instructions if there is some evidence to support a jury finding that the State failed to prove one or more elements of a greater offense. Failure to so instruct should properly result in a new trial. Elisovsky v. State, 592 P.2d 1221, 1226 (Ak. 1979); Nathaniel v. State, 668 P.2d 851 (Ak. App. 1983); Maynard v. State, 652 P.2d 489 (Ak. App. 1982); Hartley v. State, 653 P.2d 1052, 1054-55 and fn. 2 (Ak. App. 1983). The same standards apply to instructions on potential defenses in that evidence produced at trial must be

supported by more than a scintilla of evidence but less than reasonable doubt.

A review of the Statement of Facts indicates quite clearly Mr. Jackson alleged he was provoked and acted in self defense. If the jury failed to agree that he acted in self defense, then the obvious question would be whether a reasonable person under the circumstances would have been provoked by the decedent's actions. There was no such instruction to this effect which, in tandem with the failure to instruct on manslaughter, literally precluded consideration of any defense which might lead to conviction of an offense less than murder.

Trial counsel further failed to secure Mr. Jackson any advantage which might have accrued from a simple request that the Court modify its instruction that

the jury must unanimously acquit on first degree murder before they could consider second degree murder. Modification of this instruction has recently been discussed by this Court in Staael v. State, _____ P.2d _____, Ct. App. Opinion No. 454, published April 12, 1985; Dresnek v. State, _____ P.2d _____, Ct. App. Opinion No. 455, published April 12, 1985. It is also conceded that, standing alone, this may have constituted harmless error in that the defendant was found guilty of the greater offense, constituting implied rejection by the jury of the lesser included

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offense. Christie v. State, 580 P.2d 310, 318 fn. 24 (Ak. 1978); see also Warton, Criminal Procedure (12th Edition) Sec. 545 at page 32 [If the defendant could be convicted of a lesser offense, the jury should be instructed that, in case of a reasonable doubt between the degrees or offenses, it may convict of the lesser only; a general instruction that the defendant's guilt must be established beyond a reasonable doubt is not sufficient.]

It is respectfully submitted that the elements of manslaughter and the defense of provocation or heat of passion were clearly present in the defendant's account of the shooting incident. See AS 11.41.115. If not standing alone, then in combination with the errors and omissions

described above, the failure of defense counsel to request appropriate instructions deprived the defendant of his right to have the jury consider all possible theories of the case, and should result in remand for a new trial. In the alternative, it is contended failure to give such an instruction sua sponte was plain error (see Alaska Rule of Criminal Procedure 47(b); People v. Stewart, 544 P.2d 1317, 1321 (Cal. 1976). As it was both argued and supported by substantial evidence. Martin v. State, 664 P.2d 612 (Ak. App. 1982), cert. Den. _____ U.S. _____, 79 L.Ed. 234 (1984).

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B. PAGES 1-3, 11-
15 OF APPELLANT'S
REPLY BRIEF IN GREGORY
JACKSON v. STATE OF
ALASKA, ALASKA COURT
OF APPEALS NO A-805
OF APRIL 16, 1985

IN THE COURT OF APPEALS FOR THE STATE OF
ALASKA

GREGORY JACKSON,)
)
Appellant,)
)
vs.)
)
STATE OF ALASKA,)
)
Appellee.)
)

Case No. A-805

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
THIRD JUDICIAL DISTRICT AT ANCHORAGE

J. JUSTIN RIPLEY, JUDGE

APPELLANT'S REPLY BRIEF

Attorney for
Defendant/Appellant
Thomas A. Flippin, II
BOYKO, DAVIS & DENNIS
733 W. 4th Ave., Suite 400
Anchorage, AK 99501
(907) 272-5464

/S/ THOMAS A. FLIPPEN, II

FILED _____
in the Court of Appeals For
The State of Alaska.

DAVID A. LAMPEN,
Clerk of the Appellate Court

Deputy Clerk

I
THE MERIT APPEAL

A. Remand For Statement Of Reasons Supporting Denial vs. Remand for Evidentiary Hearing Re Ineffective Assistance Of Counsel

The State has taken a position that, although Mr. Jackson's motion for a new trial based on ineffective assistance of counsel was properly denied, he is entitled to a statement of reasons for such denial and an opportunity to respond thereto. Hampton v. Huston, 653 P.2d 1058 (Ak. App. 1982).

Mr. Jackson takes the position that it was error for the trial court to deny his motion for a new trial because on its face it demonstrates ineffective assistance of counsel. If this court disagrees, however, the case should be remanded for an evidentiary hearing as

required by Barry v. State, 675 P.2d 1292
(Ak. App. 1984) with respect to at least
the following potential questions:

1. Did trial counsel ever receive and review discovery materials, consisting of police reports and statements of witnesses eventually called at trial on behalf of the State? If so, when did trial counsel review those materials?
2. Is it true that trial counsel did not receive a .

transcript of Grand
Jury proceedings
relating to testimony
by the only eye
witness and the only
percipient witness
until the day trial
commenced? Is it
therefore also true
that his only reading
of those transcripts
occurred during a
recess for that
purpose which lasted
no more than
approximately 35
minutes?

3. Assuming trial counsel
was aware appellant's
version of the facts

differed materially from that stated by the eye witness and the single percipient witness, what steps, if any, did he take to investigate or otherwise seek support for appellant's account of the incident? ¹

4. Why did trial counsel fail to voir dire the jury with respect to possible racial bias and attitudes

¹ This point alone would seem to require an evidentiary hearing since "... on appeal it is contended that trial counsel could have discovered helpful evidence" but did not. Risher v. State, 523 P.2d 421, 425 fn. 20 (Alaska 1974).

concerning the black-on-black crime?

5. Did trial counsel understand that the defense of heat of passion was available? If so, why did he argue against the defense and fail to request an

-2-

appropriate
instruction?

6. Did trial counsel
understand that
manslaughter was a
lesser included
offense of murder, and
if so why or for what
tactical reason did he
fail to ask for
instructions on
manslaughter?

. . .
-3-

3. Failure to Request a Heat of Passion Instruction

Mr. Jackson further contends that failure to request a heat of passion instruction constituted ineffective assistance of counsel. The State suggests he would not have been entitled to such an instruction on the facts. Br. 19. The State's citation to Martin v. State, 664 P.2d 612 (Ak. App. 1983), cert. den. 104 S.Ct. 1001 (1984), and particularly the discussion at p. 617 of the commentary to the Illinois statute on which the Alaska defense of heat of passion and provocation

is based (As 11.41.115),⁴ has been misapplied to the facts of this case when viewed in light of Mr. Jackson's testimony about the victim's

⁴ The fact that this aspect of Alaska law is directly based on an Illinois statute would seem to reinforce Mr. Jackson's argument that his trial counsel was unfamiliar with Alaska law, and even possibly unfamiliar with the parent statute from Illinois which is his state of admission and the location of his practice.

aggressiveness and assaultive behavior. See, e.g., Tr. 745:14-746:21; 747:4-21; 750:23-75-752:12; 754:2-12; 758:9-20; 759:9-760:21; and 772:22-773:13.

It is clear that a defendant is entitled to an instruction if he produces "some evidence" in the course of trial that will support consideration of the matter by the jury. The defendant's own testimony alone has been deemed sufficient for this purpose. Brown v. State, 698 P.2d 671, 673-674, citing Toomey v. State, 581 P.2d 1124, 1126 (Alaska 1978); Paul v. State, 655 P.2d 772, 775 (Ak. App. 1982); and Folger v. State, 648 P.2d 111, 113 (Ak. App. 1982). Mr. Jackson testified that the victim offered not only insulting words, but an aggressive demeanor and tone of voice coupled with a truculent forward movement and a reaching inside of

his coat to the breast pocket area. (See transcript references ante.) If not separately, these facts in combination arguably constitute assaultive behavior. Mr. Jackson's testimony further indicates this conduct resulted in a mutual quarrel or combat when he pinned the victim's hand against his chest, telling him to remove it from his breast pocket. Under such circumstances it appears Mr. Jackson was entitled to have the jury consider an

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instruction based on heat of passion and provocation.⁵

⁵ If this aspect of the case is not regarded as ineffective assistance, it might be considered plain error for failure of the trial court to instruct on this issue *sua sponte*. Jackson's trial counsel did in fact argue heat of passion (855:7-856:13), then curiously disavowed it (Tr. 871:18-23). Failure to instruct was plain error only if the facts would have supported the instruction with some evidence, the burden of which is not heavy. Jacison's own testimony met that burden. Brown v. State, supra; Bidwell v. State, 656 P.2d 592, 594 (Ak. App. 1983); Ak. R. Crim. Pro. 47(b).

Further, plain error, if not ineffective assistance, appears by virtue of Judge Ripley's instruction that one is deemed to intend the natural consequences of knowing act. Tr. 905:22-906:3. Such language was disapproved in Sandstrom v. Montana, 442 U.S. 510 (1979), and Menard v. State, 578 P.2d 966, 968-69 (Ak. 1978). See also Malone v. State, 653 P.2d 662, 674-75 (Ak. App. 1982).

5. Acquittal Before Lessers

Lastly the State argues that it borders on the frivolous to suggest defense counsel was ineffective for failing to request modification of the trial court's instruction directing the jury not to consider any lesser included offense unless it first unanimously acquitted him of the greater offense, for example by proposing an instruction that the jury could consider lesser included offenses if it could not reach a unanimous verdict on the greater offense. This issue was pending at the time of Jackson's trial and subsequently found to be without merit in Dresnek v. State, ____ P.2d ____, Alaska Appeals Op. No. 455 issued April 12, 1985. However, it should be noted that a petition

for review was filed with the Alaska Supreme Court on May 13, 1985, and remains pending under Action No. S-963. Further, the Ninth Circuit has taken position contrary to the holding in Dresnek:

We join the Second Circuit in holding that although either formulation (i.e., an instructions on lesser included offenses, one directing the jury not to consider such matters absent an unanimous acquittal on the greater offense, and the other instructing that it may do so if unable after a reasonable effort to reach a verdict on the greater offense) may be employed if the defendant expresses no choice, it is error to reject the form timely requested by the defendant (citations omitted). U.S. v. Jackson, 726 F.2d 1466, 1469-70 (9th

Cir. 1984).

It would therefore seem that this issue remains alive and well, and that defense counsel's failure to provide a record that might benefit his client through future appellate rulings constitutes an additional facet of his constitutionally deficient performance.

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C. PAGES 1, 9-10 OF
PETITION FOR HEARING
IN GREGORY JACKSON v.
STATE OF ALASKA,
ALASKA SUPREME COURT
NO S-2626 OF FEBRUARY
2, 1988

IN THE SUPREME COURT FOR THE STATE OF ALASKA

GREGORY JACKSON,)
)
Petitioner,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
)

Case No. S-2626

(Court of Appeals No. A-2026,
Opinion No. 781)
(Superior Court No. 3ANS-83-07223 CR)

PETITION FOR HEARING
(Appellate Rule 302(a))
Prayer for Review

Petitioner seeks reversal of his
conviction for first degree murder (AS
11.41.100) and a new trial, asserting that

he was denied the effective assistance of
counsel.

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B. Tactical Decisions Made Without
Benefit of Investigation

Other courts have considered the relationship between trial counsel's failure to investigate and strategic or tactical decisions made in the course of trial:

...we conclude that while counsel's omissions might have been based on otherwise proper tactical considerations, nevertheless counsel acted without adequately investigating his client's defense. His decisions relative to the tactics available therefore were not 'informed' decisions... and so effectively deprived defendant of the presentation of a potentially meritorious defense.

People v. Shaw 674 P.2d 759, 762-63

(Cal. 1984). The U.S. Supreme Court has stated that "... strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." Strickland, 466 U.S. at 690-91.

Without citation to any authority, the intermediate appellate court suggests that defense counsel need not investigate if

the police have made "a very thorough investigation." Slip. Op. at p.7.

. . .

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EXHIBIT P.

CERTIFICATE OF SERVICE
CERTIFICATE OF SERVICE BY MAIL

I hereby certify, that pursuant to Rule 21, Rule 28.2, Rule 28.5(b) and Rule 33 of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon counsel for the Respondent/Plaintiff by depositing the same in the United States mail at Anchorage; Alaska, first class, postage pre-paid, addressed to:

Robert D. Bacon
Assistant Attorney General
Attorney General's Office
Special Prosecutions and Appeals
1031 West 4th Ave., Suite 318
Anchorage, Alaska 99501

and further that three copies of the

foregoing Appendix to Petition for Writ of Certiorari to the Supreme Court of the State of Alaska and the Court of Appeals of the State of Alaska were served upon the Attorney General of the State of Alaska by depositing the same in the United States mail, at Anchorage, Alaska, first class, postage pre-paid, addressed to:

Grace Berg Schaible
Attorney General
Attorney General's Office
Box "K"
Juneau, Alaska 99811

DATED at Anchorage, Alaska this 24th
day of June, 1988.

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